United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/984
21 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 984

Case No. 1067: ABU ALI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas, on 1 February 1999, Ali Ibrahim Abu Ali, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application containing pleas which read as follows:

"**SECTION II. PLEAS**

Applicant prays the esteemed Tribunal to ...:

a. [Rescind the] contested decision and [reinstate the] Applicant to his post.

b. [Consider the] period of cessation as special leave with full pay.

c. [Compensate] the Applicant for the damage and injury sustained.

d. [Pay] counseling and secretarial and transport expenses estimated at US$ 800."

Whereas the Respondent filed his answer on 30 November 1999;

Whereas, on 6 July 2000, the Applicant filed an additional document;

Whereas, on 7 July 2000, the Tribunal put questions to the Respondent;

Whereas, on 20 July 2000, the Respondent produced certain confidential documents requested by the Tribunal and asked that they not be transmitted to the Applicant in order to protect the identity of the witnesses;

Whereas, on 7 August 2000, the Tribunal put questions to the Applicant and to the Respondent;

Whereas, on 8 August 2000, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 7 September 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas, on 15 October 2000, the Applicant provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 January 1985 as an Area staff member, with the title of Welfare Worker, grade 7, Tyre Area Office, South Lebanon, on a twelve-month fixed-term appointment. On 1 January 1987, he received a temporary indefinite appointment. On 1 November 1987, he was reassigned to the post of Area Welfare Officer, grade 8. Effective 1 April 1995, his post was reclassified to Area Relief and Social Services Officer, grade 11. The Applicant was retroactively promoted to grade 10 effective 1 January 1994, and promoted to the full grade of the post (grade 11) on 1 April 1995. The Applicant was separated from service effective 12 May 1997.

On 5 February 1996, the Director, UNWRA Affairs, convened a Board of Inquiry (BOI) on 24 October 1995, to investigate alleged irregularities in connection with the distribution of commodities, at Jal El Bahr, Tyre Area.

On 11 November 1996, the BOI submitted a report to the Director, UNRWA Affairs, which included a number of serious allegations against the Applicant. The BOI found, among other things,

that the Applicant had arranged for an attack on a key witness, had become involved in a cover-up of the death of a refugee and had concealed serious misconduct of a member of his staff. The BOI reconvened, at the request of the Director, UNRWA Affairs, on 17 and 18 March 1997, in order to "confront accused staff members with the accusations". The Applicant was charged with the following ten allegations: forgery of ration coupons; manipulation of files requested by the BOI; using an Agency vehicle for personal business; favouritism towards his relatives in granting Special Hardship Cases (SHC) and special support projects; false registration of a deceased person as an SHC; an attempt to cover up the death of the aforementioned deceased; improperly contacting witnesses; attempting to destroy files during the inquiry; arranging a physical attack against a witness; and covering up the wrongdoings of his subordinate.

The BOI submitted a supplementary report on 15 April 1997 which not only confirmed the earlier charges but found that he had indeed tampered with witnesses, attempted to cover up the death of the refugee, attempted to destroy files in order to conceal evidence, approved and covered up the wrongdoing of his subordinate and arranged for the attack on the witness.

The Director, UNRWA Affairs, informed the Applicant by a memorandum dated 7 May 1997, that, based on the BOI's findings, he had decided to terminate the Applicant's services for misconduct pursuant to Area staff regulation 10.2, effective 13 May 1997.

On 6 June 1997, the Applicant requested the Director, UNWRA Affairs, to review his decision and on 12 June 1997, the Director, UNRWA Affairs, informed the Applicant that his decision would not be changed.

On 10 July 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 30 June 1998. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION AND JUDGEMENT**

15. ...

(a) The Board noted that the termination of the Appellant's appointment was properly made in accordance with Area Staff [Regulations and Rules].

(b) In this context, the Board believes that the Administration has acted within the framework of standing [Regulations and Rules] without the interference of prejudice or any other extraneous factors.

IV. RECOMMENDATION

16. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed."

On 6 August 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

I have carefully reviewed the Board's report and noted its conclusions. The Board noted that the termination of your appointment was properly made in accordance with Area Staff [Regulations and Rules], and opined that this action was taken without the interference of prejudice or any other extraneous factors. Accordingly, the Board unanimously recommended to uphold the decision to terminate your appointment.

I accept the Board's recommendation. Your appeal is dismissed."

On 1 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The BOI investigation was incomplete and prejudicial and violated due process. The Applicant was not permitted the opportunity to confront and examine a number of key witnesses.

2 The JAB was provided only with extracts of the BOI reports and therefore did not give the case a proper hearing. It failed to exercise its duties and obligations in that regard.

3. The Respondent's decision to terminate the Applicant's services for misconduct was arbitrary and without legal or factual foundation.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's services for misconduct fell within the discretionary powers of the Commissioner-General.

2. The Respondent's decision to terminate the Applicant's services for misconduct was correct, not motivated by any improper motive and supported by evidence.

The Tribunal, having deliberated from 5 July to 2 August 2000 in Geneva and from 31 October to 21 November 2000 in New York, now pronounces the following judgement:

I. Following the distribution of commodities on 24 October 1995 at Jal El Bahr in the Tyre area, allegations of irregularities involving certain staff members were brought to the attention of the Administration. In consequence, the Director of UNRWA Affairs, Lebanon, established a BOI to investigate the alleged irregularities and to report thereon, and on any non-compliance found with Agency Rules, Regulations and Norms.

II. On 11 November 1996, the BOI submitted to the Respondent what could be best described as an Interim Report. The BOI identified ten allegations made against the Applicant which were considered both sufficiently serious and substantiated to warrant being put to the Applicant in greater detail. In that Interim Report the BOI listed in the form of a précis some of the allegations which some witnesses had made concerning the Applicant. It did not in each instance identify by name the persons who had made those allegations and only identified persons by letters or numbers.

The Interim Report further contained a record of the BOI's interview of the Applicant on 26 February 1996. It appears therefrom that he had been questioned regarding only some of the allegations which had been made against him.

In its Report, the BOI also found that the Applicant had arranged for an attack on a key witness, that he was implicated in a cover-up of the death of a named and identified refugee to whom a special support project had been awarded after her death, and that he had knowledge of and concealed certain wrongdoings on the part of one of his subordinates.

III. After the release of the Interim Report, the BOI was reconvened to afford the Applicant an opportunity to respond to the allegations made against him, and so that the BOI could prepare its Supplementary Report.

IV. It appears from the 15 April 1997 Supplementary Report that the BOI believed that "facing the generally dangerous atmosphere in the Tyre area, [it] could not spell out names of witnesses as this could jeopardize the safety of some of them". The BOI used names only "when it was obvious who had witnessed and the person therefore already was identified".

V. In the Supplementary Report, the BOI confirmed and amplified its earlier findings against the Applicant, but also added new charges. In the opinion of the Tribunal, many of the individual findings made by the BOI adverse to the Applicant confirmed clear and undoubted misconduct.

VI. The Director of UNRWA Affairs, Lebanon, having considered the findings of the BOI as set out in both Reports wrote to the Applicant on 7 May 1997, indicating that the investigations of the BOI had revealed that the Applicant had committed serious misconduct. He enclosed relevant extracts of the BOI's Reports which set out in detail the BOI's unanimous findings of the Applicant's misconduct. He also enclosed copies of the testimony which had been given by the Applicant to the BOI. He concluded that based on the severity of the Applicant's misconduct he had decided to terminate the Applicant's services for misconduct effective 12 May 1997 at close of business.

VII. On 6 June 1997, the Applicant wrote to the Director of UNRWA Affairs, Lebanon, requesting him to review his decision. On 12 June 1997, the Director of UNRWA Affairs, Lebanon, wrote to the Applicant confirming that the said decision was warranted and would not be changed.

VIII. The Applicant submitted his appeal against that decision to the JAB. The JAB stated that it had examined all documents before it and concluded that that the Administration had acted within the framework of standing Regulations and Rules without the interference of prejudice or any other

extraneous factor. It noted that the termination of the Applicant's appointment was properly made in accordance with the Area Staff Regulations and Rules and unanimously recommended to uphold the Administration's decision to dismiss the case.

On 6 August 1998, the Commissioner-General accepted the JAB's recommendation.

IX. The Applicant seeks rescission of the Respondent's decision claiming that the findings of the BOI were "unsubstantiated, premised on mistakes of fact, errors in law, a premeditated preconceived Judgement, and indications of bias and prejudice".

X. Whilst the BOI had put all ten allegations originally identified in its Interim Report to the Applicant, it ultimately made a finding adverse to the Applicant on only six of those allegations.

The Tribunal is satisfied that there was sufficient evidence before the BOI to justify the adverse finding made against the Applicant on those six allegations. The Tribunal is also satisfied that the BOI, the body that had heard the testimony of the witnesses and the Applicant's denials, was accordingly best positioned to make decisions on credibility as it had seen and heard all parties and observed their demeanour. The Tribunal does not consider it appropriate in this case to interfere with the BOI's findings.

XI. As to the contentions that the adverse findings were made as a result of premeditated preconceived judgement and indications of bias and prejudice, the Applicant provides no supporting evidence. Furthermore the Tribunal can find no evidence to support these contentions from examination of any of the documents herein.

XII. The Applicant takes issue with the proceedings before the JAB, on the basis that there is nothing contained in the JAB report to indicate that the JAB dealt with any of the real issues before it and that it had merely gone through the motions of giving the case a hearing and had paid no more than lip service to its duties and obligations in that regard.

XIII. The Tribunal agrees that the format and content of the JAB report is wholly unsatisfactory, since it does not contain any reference to having investigated the issues properly or at all and contains merely formulaic type recitations. Be this as it may, the Tribunal does not consider that it would be appropriate to interfere with the decision made by the Respondent to terminate the Applicant's services for misconduct on that ground, as the matters relied upon by the Respondent in making that decision were the findings of the BOI and not the recommendation of the JAB. The Tribunal deplores reports written in such formulaic and arid language and wishes to remind appeals boards that their recommendations are subject to review. Such review is very difficult when the written report fails to disclose how the appeals board dealt with issues and what facts they found to support their recommendations.

XIV. The Tribunal is concerned with whether the Applicant had been afforded fair procedures by providing him with sufficient information as would have enabled him to understand the charges of misconduct made against him and from responding adequately thereto. The Tribunal accordingly sought further information concerning these aspects of the proceedings from both parties and received their responses. The Tribunal has obtained the full record of the proceedings both of the BOI and of the JAB and considered those records carefully. The full records are not being made available to the Applicant because of the concerns for their safety and well-being expressed by some of the witnesses who gave evidence to the BOI.

XV. Having carefully considered the record of the BOI and the various submissions and other documents, the Tribunal is satisfied that the nature and detail of the allegations of misconduct investigated by the BOI were made known to the Applicant prior to his being called upon to respond to same, as was the nature and detail of the evidence said to have supported those allegations. The Tribunal is also satisfied that the Applicant was provided with sufficient information concerning those charges necessary to have enabled him to respond to them in a meaningful way and is satisfied that he was afforded due process.

XVI. The Applicant had prior to the commencement of the proceedings before the JAB sought copies of all documents arising from the inquiry of the BOI, including its full Report. The Head, Area Personnel Section, UNRWA Headquarters, Gaza, informed the Applicant that "it has been determined that there is a real and apparent danger to the personal security of the witnesses who gave testimony to the BOI should transcripts of those testimonies be released. As a result I am authorized on behalf of the Administration to inform you that it has been decided not to provide you with those testimonies".

The Tribunal notes the Respondent's position on the record as follows:

> "21. The two Board of Inquiry reports covered the investigation into allegations against four Area staff members and the Administration has released to the Appellant all relevant sections of the two Board of Inquiry reports relating to the Appellant. The Administration considers there is ample support for the findings of the Board of Inquiry in the witness statements collected during the extensive investigation. However, the Administration is unable to disclose these statements because of a real danger to the security of the witnesses concerned. The principal witnesses have been contacted for permission to release their statements to the Appellant for the purposes of the deliberations of the Joint Appeals Board, however, each witness requested his/her statement to be withheld for his/her own protection. The attention of the Joint Appeals Board is drawn to the opening paragraphs of the Board of Inquiry's supplemental report of 15 April 1997 (...) where it is stated that '[f]acing the generally dangerous atmosphere in the Tyre Area, the Board could not spell out names of witnesses as this would jeopardise the safety of some of them'. In addition, it should be noted that one of the witnesses who gave evidence before the Board of Inquiry was assaulted in the presence of the Appellant soon after giving his testimony (...). The danger to the personal security of the witnesses, which would result from releasing the witness statements has also been confirmed by the Field Administraton Officer, Lebanon (...). Nevertheless, the Administration submits that the Board of Inquiry, having heard the oral evidence and having seen the witnesses giving such evidence, was best placed to make assessments of credibility and weight and the Joint Appeals Board should defer to its judgement and findings."

XVII. The Tribunal also must consider whether there was sufficient information before the JAB for it to have adequately reviewed the evidence which had been considered by the BOI and to make its independent assessment of that evidence in order to ascertain if it was adequate to support the findings of the BOI.

The Tribunal is satisfied that the proceedings of the BOI had been fair and that the Applicant's rights to due process were respected, notwithstanding that the identity of many of the witnesses had been kept from him. The Tribunal is satisfied that the proceedings before the BOI afforded the Applicant with such information as was permissible in the light of the concerns expressed for the safety of witnesses and were sufficient to vindicate the applicant's due process rights, limited as they were by the constraints or needs for protecting the witnesses' safety. The Tribunal is however not satisfied that such rights were adequately vindicated by the Respondent or by the JAB in the course of the JAB proceedings. However, the Tribunal is concerned that there was not sufficient material placed before the JAB to enable it to have discharged its duties and obligations in a proper and appropriate manner and is further concerned with the manner in which the JAB actually approached the hearing and consideration of the Applicant's appeal.

XVIII. There is nothing contained in the report of the JAB which demonstrates that it had addressed the issues which arose in the proceedings before it and it may well be that there is merit in the Applicant's submission that it had done no more than go through the motions. The Tribunal notes that the Applicant was not only entitled to a fair and proper hearing before the BOI, but that he was entitled to similar consideration before the JAB. The Tribunal is wholly unconvinced that the Applicant was afforded due process or proper consideration in the proceedings before the JAB. Accordingly the Tribunal finds that his rights to an appropriate hearing and an appropriate and proper review by the JAB were not vindicated.

XIX. The Tribunal further considers that the JAB had not in any event received sufficient information to enable it to carry out a proper independent assessment of the proceedings and findings of the BOI, had it been prepared to carry out such a review and assessment. It had before it only the "extracts" from the testimonies of witnesses who had given evidence in the course of the BOI's investigations. These by themselves did not contain sufficient information to support all of the adverse findings of the BOI. The JAB, which should have considered the Applicant's complaints that he was not afforded due process, clearly failed to consider them at all. The JAB's conclusion that the Agency "in deciding to terminate the Applicant's services had acted within the framework of standing

Regulations and Rules without prejudice or other extraneous factor" clearly never dealt with the issues which were central to the Applicant's appeal.

XX. Although the Tribunal finds that the Applicant was not afforded due process and fair procedures before the JAB, it considers that the shortcomings in its proceedings have been fully redressed by the Tribunal's reconsideration of the entire proceedings. Therefore, the Tribunal is satisfied that these shortcomings did not result in any loss or damage to the Applicant.

XXI. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary

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DISSENTING OPINION BY MR. KEVIN HAUGH

I agree with the judgement of the Tribunal save that I consider the Applicant should be awarded compensation for the violation of his right to have had a meaningful review of his appeal by the JAB. This was rendered impossible by reason of the Administration's unwillingness to furnish to the JAB such information and documents as were necessary for a meaningful review of his case. I would consider appropriate compensation to be three months net base salary as of the date of his dismissal.

(Signatures)

Kevin HAUGH
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary